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SENATE

{ REPORT
No. 91-1058

LT. COL. EARL SPOFFORD BROWN

JULY 30, 1970.—Ordered to be printed

Mr. BURDICK, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 6377]

The Committee on the Judiciary, to which was referred the bill (H.R. 6377) for the relief of Lt. Col. Earl Spofford Brown, U.S. Army Reserve (retired), having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of the proposed legislation is to relieve Earl Spofford Brown, a retired Army Reserve lieutenant colonel, of liability in the amount of \$3,522.81 for overpayments of longevity pay in the period from June 1, 1942, through May 31, 1961, based on erroneous credit for service as a cadet in the Merchant Marine Reserve of the U.S. Naval Reserve.

STATEMENT

In its favorable report on the bill, the House Judiciary Committee set forth the facts of the case as follows:

The Department of the Army in its report to the committee on a similar bill in a previous Congress stated that it had no objection to the legislation. The Comptroller General in his report on the same bill questioned relief but stated that whether it should be granted in this case is a matter for final determination by the Congress.

The history of this matter dates back to May 8, 1941, when Colonel Brown began his service as a warrant officer in the Army Mine Planter Service. He continued on active duty through June 30, 1961, and reached the grade of lieutenant colonel, Army of the United States, and retired on that date with over 20 years' active Federal service. The credit for merchant marine service, which was subsequently questioned and forms the basis of the overpayment referred to in the bill, dates back to June 1, 1942, from which date Colonel Brown was credited for longevity pay purposes with 2 years and 7 days as prior military service, which is based on the period from May 1, 1939, to May 7, 1941, when he held the status of a cadet in the Merchant Marine Reserve. It was subsequently determined just 3 days before he retired on July 1, 1961, that he had been erroneously paid longevity for this service. The result was that his final pay, allotments, and accrued leave entitlements totaling \$2,736.02 were withheld by the Army at the time of his retirement. A final audit of his records established a total overpayment of \$3,522.81 which is the amount stated in the present bill.

The committee concluded that relief is appropriate in this case in light of the explanation in the Army report. In this connection, the Army report stated:

"* * * there were apparently no specific guidelines available to those officers with a status such as that held by Lieutenant Colonel Brown until May 1959, when the Comptroller General responded to a request by the Secretary of Defense for guidance in like cases. Moreover, Lieutenant Colonel Brown in February of 1949 requested a statement of service from the Navy Department for the purpose of substantiating his total service in the Army Register. That Department advised him that he 'entered naval service as cadet, Merchant Marine Reserve, U.S. Naval Reserve, on May 1, 1939, and honorably discharged effective December 21, 1942.' The Adjutant General on June 28, 1957, verified this same service as a part of his total service creditable for longevity pay. Under these conditions it is clearly apparent that Lieutenant Colonel Brown received the longevity overpayment in good faith as he could certainly be expected to rely upon an administrative determination by the appropriate agency of the Army as to his creditable service. It has further been established that repayment imposes a hardship upon Lieutenant Colonel Brown whose responsibility to his family includes support for his wife and five children, two of which are in college. It accords, therefore, with principles of equity and good conscience to relieve him of liability to repay the United States money paid him over 20 years in small amounts through administrative error, and received by him in good faith, repayment of which results in financial hardship. The Department of the Army has no objection to the bill."

The committee after a review of the foregoing concurs in the action taken by the House of Representatives and recommends favorable consideration of H.R. 6377, without amendment.

Attached hereto and made a part hereof are: (1) a letter dated February 17, 1964, from the Department of the Army, and (2) a letter dated August 6, 1963, from the Comptroller General.

DEPARTMENTAL REPORTS

DEPARTMENT OF THE ARMY,
Washington, D.C., February 17, 1964.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of the Army with respect to H.R. 7131, 88th Congress, a bill for the relief of Lt. Col. Earl Spofford Brown, U.S. Army Reserve (retired).

This bill provides:

"The Earl Spofford Brown, lieutenant colonel, United States Army Reserve (retired), O1080178, is relieved of all liability for repayment to the United States of the sum of \$3,522.81 representing the amount of overpayments in longevity pay received by him for the period from June 1, 1942, through May 31, 1961, while he was serving as a member of the United States Army, resulting from administrative error on the part of Army personnel.

"SEC. 2. The Comptroller General of the United States or his designee shall relieve disbursing agents of the Army, Navy, and Air Force from accountability or responsibility for any payments described in section 1 of this Act, and shall allow credits in the settlements of the accounts of those officers or agents for payments which are found to be free from fraud or collusion.

"SEC. 3. The Secretary of the Treasury is authorized and directed to pay, out of any money in the Treasury, not otherwise appropriated, to the said Earl Spofford Brown, the sum of any amounts received or withheld from him on account of the overpayments referred to in section 1 of this Act. No part of the amount appropriated in this Act in excess of 10 per centum thereof shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding \$1,000."

The Department of the Army has no objection to the bill. Earl Spofford Brown, departmental records disclose, retired from the Army on July 1, 1961, in the grade of lieutenant colonel, U.S. Army Reserve, with more than 20 years of active and honorable military service. Prior to initial entry on active duty with the Army, he underwent on-the-job training in the Merchant Marine Reserve for the purpose of obtaining a commission in that service. As a part of and during that training he held the appointment of cadet, Merchant Marine Reserve, U.S. Naval Reserve, from May 1, 1939, until he resigned on May 7, 1941. On the following day he entered active duty with the Army under appointment as a warrant officer, second mate, Army Mine Planter Service, Regular Army, and served as such until he was commissioned as an

officer in the Army of the United States on September 2, 1942. He was reappointed a Regular Army warrant officer in November of 1954 but continued to serve in his commissioned status, with a concurrent appointment in the Officer Reserve Corps, until retirement, at which time he vacated his Regular Army warrant.

Three days before he retired on July 1, 1961, Lieutenant Colonel Brown was notified by the Army that he had been erroneously paid longevity for his service as a cadet, Merchant Marine Reserve, U.S. Naval Reserve, such erroneous payment extending over his entire period of active commissioned duty. Accordingly, his final pay, allotments, and accrued leave entitlements, totaling \$2,736.02, were withheld by the Army at retirement, pending an audit of his records, which when completed in September 1961 established a total overpayment of \$3,522.81—the amount of the present bill. This amount, when offset by the moneys withheld at retirement, is reduced to \$786.79 for which he is still indebted to the United States.

While it is true that under existing law, service as a cadet, Merchant Marine Reserve, U.S. Naval Reserve, is held not creditable by an officer for longevity pay purposes, there were apparently no specific guidelines available to those officers with a status such as that held by Lieutenant Colonel Brown until May 1959 when the Comptroller General responded to a request by the Secretary of Defense for guidance in like cases. Moreover, Lieutenant Colonel Brown in February of 1949 requested a statement of service from the Navy Department for the purpose of substantiating his total service in the Army Register. That Department advised him that he “entered naval service as cadet, Merchant Marine Reserve, U.S. Naval Reserve on May 1, 1939, and honorably discharged effective Dec. 21, 1942.” The Adjutant General on June 28, 1957, verified this same service as a part of his total service creditable for longevity pay. Under these conditions it is clearly apparent that Lieutenant Colonel Brown received the longevity overpayment in good faith as he could certainly be expected to rely upon an administrative determination by the appropriate agency of the Army as to his creditable service. It has further been established that repayment imposes a hardship upon Lieutenant Colonel Brown whose responsibility to his family includes support for his wife and five children, two of which are in college. It accords, therefore, with principles of equity and good conscience to relieve him of liability to repay the United States money paid him over 20 years in small amounts through administrative error, and received by him in good faith, repayment of which results in financial hardship. The Department of the Army has no objection to the bill.

The fiscal effect of this bill will be to waive the total indebtedness, \$3,522.81, and to repay \$2,736.02 withheld on account of the indebtedness.

The Bureau of the Budget advises that from the standpoint of the administration's program there is no objection to the presentation of this report for the consideration of the committee.

Sincerely yours,

STEPHEN AILES,
Secretary of the Army.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, August 6, 1963.

B-151872.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: Reference is made to your letter of June 21, 1963, acknowledged June 25, requesting our views on H.R. 7131, 88th Congress, introduced for the relief of Lt. Col. Earl Spofford Brown.

The bill provides that Earl Spofford Brown, lieutenant colonel, U.S. Army Reserve (retired) "is relieved of all liability for repayment to the United States of the sum of \$3,522.81 representing the amount of overpayments in longevity pay received by him for the period from June 1, 1942, through May 31, 1961, while he was serving as a member of the U.S. Army, resulting from administrative error on the part of Army personnel."

Under section 2 of the bill disbursing agents of the Army, Navy, and Air Force are relieved from accountability or responsibility for any payments described in section 1 of the bill and such agents are entitled to credit in the settlements of their accounts for such payments which are found to be free from fraud or collusion. The Secretary of the Treasury is authorized and directed (sec. 3) to pay out of any money in the Treasury, not otherwise appropriated, to Earl Spofford Brown, the sum of any amounts received or withheld from him on account of the overpayments referred to in section 1.

Colonel Brown's military career commenced May 8, 1941, as a warrant officer in the Army Mine Planter Service. He was commissioned a second lieutenant September 4, 1942 (this appears to have been a temporary appointment accomplished pursuant to the provisions of the joint resolution of September 22, 1941, ch. 414, 55 Stat. 728, with the saved pay and allowances of a warrant officer as retroactively provided in the act of July 7, 1943, ch. 191, 57 Stat. 380), continuing on active duty through June 30, 1961. On the latter date, while serving in the grade of lieutenant colonel, Army of the United States, he was retired upon his own application (see par. 44, Department of the Army Special Orders No. 108, May 4, 1961) as provided in 10 U.S.C. 3911 with over 20 years' active Federal service.

The record shows that during the period from June 1, 1942, to May 31, 1961, inclusive, Colonel Brown was credited for longevity pay purposes with 2 years and 7 days as prior military service, representing the period May 1, 1939, to May 7, 1941, inclusive, that he held the status of a cadet in the Merchant Marine Reserve, a component of the U.S. Naval Reserve (34 U.S.C. 853, 1940 edition). Service as a cadet (or midshipman) in the Merchant Marine Reserve of the U.S. Naval Reserve was not creditable in the case of commissioned officers in the military or naval forces for longevity pay purposes either under the Pay Readjustment Act of 1942, chapter 413, 56 Statute 359, effective June 1, 1942, or under the Center Compensation Act of 1949, chapter 681, 63 Statute 802, which became effective October 1, 1949. (See decision of May 28, 1959, B-138889, 38 Comp. Gen. 797, copy enclosed, concerning the provisions of the 1949 law.)

Under the 1942 act, as amended by the act of September 7, 1944, chapter 407, 58 Statute 729, commissioned officers of the military and naval forces of the United States were entitled to include for longevity purposes in computing their active duty pay effective from June 1, 1942, all periods during which they were enlisted or held commissions as officers or warrant officers, or held appointments as warrant officers in any of the services mentioned in the title of that law. The 1942 statute thus specifically designated the service to be credited to commissioned officers for longevity pay purposes and such creditable service, as above indicated, consisted of enlisted, warrant, or commissioned service. The law did not enumerate cadet or midshipman service and Army Regulations 35-1680, August 5, 1942, as amended and superseded (reflecting the provisions of the Pay Readjustment Act of 1942, which became effective June 1, 1942) did not authorize credit, with certain specific exceptions not here in point, of such service for longevity pay purposes.

Since at least some of the personnel of the Army who handled Colonel Brown's active duty pay and allowance accounts for a period of over 20 years (from May 1941 to June 1961) may be presumed to have been aware of the provisions of law and regulations above referred to barring, generally, credit for all cadet and midshipman service for purposes of longevity pay, we surmise that they may not have been correctly informed, initially, that Colonel Brown's status during the period from May 1, 1939, to May 7, 1941, inclusive, had been that of a cadet (or midshipman) in the Merchant Marine Reserve rather than an "enlisted," "warrant," or "commissioned" status in the U.S. Naval Reserve. We do not mean to imply that at any point Colonel Brown deliberately or intentionally concealed or withheld pertinent information in the matter inasmuch as he may well have been unaware of the distinction between cadet or midshipman service in the Merchant Marine Reserve and that of enlisted, warrant or commissioned service in the U.S. Naval Reserve. However that may be, it is clear that his "cadet" or "midshipman" status in the Merchant Marine Reserve during the period May 1, 1939, to May 7, 1941, inclusive, does not appear to have come to the attention of anyone in the Department of the Army with knowledge of cadet service having been credited to him for pay purposes until June 1961. Hence the overpayment in question may not have resulted entirely "from administrative error on the part of Army personnel" as stated in the bill.

No officer or agent of the Government may legally disburse public money unless he has authority so to do (*Fansteel Metallurgical Corporation v. United States*, 145 Ct. Cl. 496 (1959)). The courts have consistently held that persons receiving erroneous payments from the U.S. Government made through administrative error by its officers, whether made under mistake of fact or law, acquire no right thereto and are bound in equity and good conscience to make restitution, since restitution results in no loss to them, they having received something for nothing. (See *Barnes, et al. v. District of Columbia*, 22 Ct. Cl. 366; *United States v. Burchard*, 125 U.S. 176; *Wisconsin Central Railroad v. United States*, 164 U.S. 190; *United States v. Northwestern National Bank and Trust Company of Minneapolis*, 35 F. Supp. 484, 486; and the cases collected and discussed in *United States v. Sutton Chemical*

Company, 11 F. 2d 24, and in 63 A.L.R. 1346.) Even financial hardship which might result from collection from the recipient or, as is usually the case, the fact that the payments may have been received in good faith "cannot stand against the injustice of keeping what never rightfully belong to him at all" (*United States v. Bentley*, 107 F. 2d 382, 384). (See also *Rains v. United States*, Ct. Cl. No. 114-60, decided February 6, 1963.)

Colonel Brown's military pay record which was closed as of June 30, 1961, the date of his transfer to the retired list, discloses that \$2,736.02 of the amount therein stated to be due him (which amount included payment for 60 days of unused and accrued leave) was applied to his "longevity" indebtedness of \$3,522.81, leaving uncollected and still due the United States the balance of \$786.79. Under the act of July 15, 1954, chapter 509, 68 Statute 482, 5 U.S.C. 46d, the indebtedness of any member of the Army, Navy, Air Force, Marine Corps, or Coast Guard, or Reserve component thereof, resulting from any erroneous payment made by the department concerned, may be collected in monthly installments by deduction in reasonable amounts from the current pay account of such persons, including retired pay. The record before us does not disclose that any action has been taken by the Department of the Army with respect to making deductions from Colonel Brown's retired pay under authority of the 1954 law.

The enactment of bills like H.R. 7131 tend not only to encourage lax disbursing and administrative practices in the military and naval services, but also constitute a clear invitation to all others who have been overpaid to neglect or even refuse to repay their just debts to the Government and to seek personal relief through private legislation. We recognize, of course, that relief for indebtedness on account of certain overpayments of military pay and allowances may be justifiable in special instances. Compare section 13 of the Dependents Assistance Act of 1950, chapter 922, 64 Stat. 797, 50 U.S.C., appendix 2213. We do not view with favor, however, legislation such as that proposed in this bill which grants preferential treatment to a particular individual over other individuals similar situated. We find no special equity in Colonel Brown's case which would justify us in recommending favorable consideration of H.R. 7131, the Government having received nothing for the erroneous longevity payments which were made to Colonel Brown. Of course, the question whether relief should be granted in this case is a matter for final determination by the Congress.

Sincerely yours,

JOSEPH CAMPBELL,

Comptroller General of the United States.

In view of the facts outlined, it is concluded that this is an appropriate subject for relief and it is recommended that the bill be reported favorably.

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